Seyed Mohamed Basheer Sathakatullah (W/N India) v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-525–11 OF 2017
KAMARDIN HASHIM, RHODZARIAH BUJANG AND MOHAMAD ZABIDIN JJCA
13 MAY 2019

Criminal Procedure — Defence — Shift in defence — Accused's testimony in court of how he came to be in possession of bags containing dangerous drugs totally varied from what he had stated in his cautioned statement recorded after his arrest — Whether contradictions impacted negatively on accused's defence and his credibility as witness — Whether trial judge rightly rejected defence's story as afterthought — Whether absence of fingerprint evidence or of CCTV recordings to implicate accused could not rebut presumption that he had knowledge of drugs or amount to casting reasonable doubt on prosecution's case — Whether there was overwhelming evidence to show accused guilty of charge

The appellant, an Indian national, was convicted and sentenced to death by the High Court for trafficking in 20,364g of ketamine which was found in a trolley bag and a sling bag that were on a baggage trolley he was pushing at the Kuala Lumpur International Airport ('KLIA') shortly after his arrival on a flight from India. The drugs were found during a search of the bags by a customs officer after a scan of the bags showed the presence of suspicious items. In his defence to the charge of trafficking, the appellant claimed that the bags containing the ketamine belonged to a man named Pitchai who had travelled with him on the same flight. The appellant said he was told that the bags contained a special rice powder not available in Malaysia and when they arrived at KLIA the appellant helped Pitchai to transport the bags by putting them on his trolley. However, as the bags were being scanned at the customs checkpoint the appellant realised that Pitchai had disappeared. Evidence was given at the trial that there was indeed a passenger named Pitchai on the same flight as the appellant. However, the trial judge rejected the appellant's story as an afterthought as it contradicted his cautioned statement, recorded two days after his arrest, in which the appellant had given an entirely different version of how the bags containing the ketamine came to be on the trolley that he was pushing. The appellant also claimed that he was prejudiced by the prosecution's failure to adduce evidence of CCTV recordings or of the existence of his finger-prints on the packages containing the ketamine. The instant appeal was against the appellant's conviction and sentence.

Held, unanimously dismissing the appeal and affirming the conviction and sentence:

(1) The trial judge could not be faulted for labelling the appellant's defence as an afterthought and for rejecting the same. Pitchai was never at all mentioned in the cautioned statement and, what was worse, the sling bag containing the drug was said to have been placed on the trolley by a co-passenger. The appellant's testimony in court was in total variance with what he had stated in his cautioned statement. The obvious contradictions impacted negatively on the appellant's defence and on his credibility as a witness. The probability could not be ruled out that the defence had simply picked Pitchai's name from the flight manifest, which had been tendered in evidence by the prosecution, to say that Pitchai owned the bags containing the ketamine. The trial judge found it difficult to believe that the appellant would have gone overboard to help Pitchai. The judge also found that the appellant had been willfully blind for not examining the bags thoroughly (see paras 12–13).

(2) The appellant claimed that he had been prejudiced by the absence of CCTV recordings and the absence of evidence of his fingerprints on the packages containing the impugned drugs. Such evidence, however, was merely corroborative and did not in any way raise any reasonable doubt on the prosecution's case and/or rebut the presumption that the appellant had knowledge of the drugs, given the overwhelming evidence that had been stacked against him, in particular the fact that the appellant had the keys to open the bags as well as his extremely weak defence. With regard to the absence of fingerprint evidence on the incriminating items, not much weight could be attached to it because, in criminal law, a person could still be in possession of a moveable thing without actually being in physical contact with it. What was important was that he was so situated with respect to the thing that he had the power to deal with it as owner to the exclusion of all other persons (see paras 14–15).

[Bahasa Malaysia summary

Perayu, seorang warganegara India, telah disabit bersalah dan dihukum mati oleh Mahkamah Tinggi kerana mengedar dadah ketamine seberat 20,364g yan dijumpai dalam beg troli dan beg sandang yang berada dalam troli bagasi yang ditolak olehnya di Lapangan Terbang Antarabangsa Kualsa Lumpur ('KLIA') sejurus selepas dia tiba dengan penerbangan dari India. Dadah yang dijumpai semasa pemeriksaan beg oleh pegawai kastam selepas imbasan beg-beg tersebut menunjukkan kehadiran barangan yang mencurigakan. Dalam pembelaannya terhadap pertuduhan pengedaran, perayu mendakwa bahawa beg-beg yang mengandungi ketamine itu dimiliki oleh seorang yang bernama Pitchai yang telah bersamanya atas penerbangan yang sama. Perayu mengatakan dia diberitahu bahawa beg-beg tersebut mengandungi serbuk beras istimewa yang tidak terdapat di Malaysia dan apabila mereka tiba di KLIA perayu membantu

Pitchai untuk mengangkut beg-beg tersebut dengan meletakkannya dalam trolinya. Walau bagaimanapun, semasa beg-beg tersebut sedang diimbas di pusat pemeriksaan kastam perayu menyedari yang Pitchai telah menghilangkan diri. Keterangan telah diberikan semasa perbicaraan bahawa memang terdapat penumpang bernama Pitchai dalam penerbangan sama dengan perayu. Namun begitu, hakim perbicaraan telah menolak versi perayu sebagai suatu yang telah difikirkan kemudian kerana ia bercanggah dengan kenyataan beramarannya, yang telah direkodkan dua hari selepas tangkapannya, yang mana perayu telah memberikan versi yang sama sekali berbeza tentang bagaimana beg-beg yang mengandungi ketamine itu boleh berada dalam troli yang ditolak olehnya. Perayu juga mendakwa bahawa dia telah diprejudis akibat kegagalan pendakwaan mengemukakan keterangan rakaman CCTV atau kewujudan cap jarinya pada bungkusan yang mengandungi ketamine itu. Rayuan ini adalah terhadap sabitan dan hukuman perayu.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Hakim perbicaraan tidak boleh disalahkan kerana melabelkan pembelaan perayu sebagai suatu yang difikirkan kemudian dan kerana menolak yang sama. Pitchai tidak langsung dinyatakan dalam kenyataan beramaran dan, apa yang lebih teruk, beg sandang yang mengandungi dadah itu dikatakan telah diletakkan dalam troli itu oleh seorang penumpang bersama. Keterangan perayu di mahkamah sama sekali berbeza dengan apa yang dinyatakan olehnya dalam kenyataan beramarannya. Percanggahan yang jelas ini memberi impak negatif kepada pembelaan perayu dan terhadap kebolehpercayaannya sebagai saksi. Kebarangkalian tidak boleh diketepikan bahawa pembelaan itu sewenang-wenangnya telah memetik nama Pitchai daripada penumpang pesawat, yang telah ditenderkan sebagai keterangan oleh pendakwaan, untuk mengatakan bahawa Pitchai memiliki beg-beg yang mengandungi ketamine itu. Hakim perbicaraan mendapati ia sukar untuk mempercayai bahawa perayu sanggup bersusah payah menolong Pitchai. Hakim juga mendapati bahawa perayu dengan sengaja tidak memeriksa beg-beg itu dengan teliti (lihat perenggan 12–13).

(2) Perayu mendakwa bahawa dia telah diprejudis dengan ketiadaan rakaman CCTV dan ketiadaan keterangan cap jarinya pada bungkusan yang mengandungi dadah yang dipersoalkan itu. Keterangan tersebut, bagaimanapun, hanya menyokong dan tidak dalam apa cara menimbulkan apa-apa keraguan munasabah ke atas kes pendakwaan dan/atau mematahkan andaian bahawa perayu mempunyai pengetahuan tentang dadah tersebut, berdasarkan keterangan yang banyak dikemukakan terhadapnya, terutamanya fakta bahawa perayu mempunyai kunci untuk membuka beg-beg itu dan juga pembelaannya yang tidak kukuh. Berhubung ketiadaan keterangan cap jari pada barang

yang dicurigai itu, tidak banyak beban dapat diletakkan ke atasnya kerana, dalam undang-undang jenayah, seseorang masih boleh memiliki benda yang boleh gerak tanpa mempunyai sentuhan fizikal sebenar dengannya. Apa yang penting adalah dia dalam keadaan yang mana dia mempunyai kuasa untuk mengendalikan benda itu sebagai pemiliknya dan tiada orang lain (lihat perenggan 14–15).]

Notes

For a case on shift in defence, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2302.

Cases referred to

Mazlani bin Mansor v PP and other appeals [2014] 2 MLJ 18, CA (folld)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311, SC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a), First Schedule

Appeal from: Criminal Trial No 45A-91–09 of 2014 (High Court, Shah Alam)

S Sundarajan (Sundarajan & Assoc) for the appellant.
Mangaiarkarasi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rhodzariah Bujang JCA:

INTRODUCTION

[1] The appellant, an Indian national, was charged and convicted by the High Court in Shah Alam for the offence of trafficking in 20,364g of ketamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and was sentenced to the mandatory death sentence for it. The offence was committed at the Passengers Examination Counter 1 of Kuala Lumpur International Airport ('the airport') on the 13 January 2014 at about 12.10am. The charge, in Bahasa Malaysia, reads:

Bahawa kamu pada 13 Januari 2014, lebih kurang jam 12.10 pagi di Cawangan Pemeriksaan Penumpang 1 (CPP 1), Balai Ketibaan Antarabangsa, Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya iaitu ketamine seberat 20,364 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

A PRIMA FACIE CASE

[2] The discovery of the drugs, found in a trolley bag and in a sling bag which were pushed by the appellant on a baggage trolley was prompted by the customs officer on duty at the airport, that is Mohd Zulhari bin Che Hamid ('PW7'), who said that when he saw the appellant, he was '... dalam keadaan mencurigakan ...' and when first stopped by PW7, the appellant was seen talking on his handphone. Another sling bag on the said trolley was found to contain the appellant's clothings and personal effects. The said bags were scanned upon instruction by PW7 although according to PW7, the appellant at first just looked at him and did not comply with his directive to do so but just focused his attention on the said call on his handphone. Suspicious green images were seen on the monitor manned by another customs officer, Mohd Sabri bin Abdullah ('PW4') which then led to a physical examination of the trolley bag and the sling bag upon the padlocks to the bags being unlocked by PW7 with keys taken from the appellant's wallet. According to PW7, the appellant was hesitant when he took out the keys from his wallet. From the said examination, PW7 found four packages (three black ones and one in transparent plastic) covered with vegetable, that is spinach, in the trolley bag and two black packages in the sling bag. These packages were then sent to the chemist, Norhaya bt Jaafar (PW8) who confirmed that they contained ketamine and of the weight as stated in the charge.

[3] PW7 testified in his witness statement (exh P25 at pp 92–98 of the appeal record Vol 3B) that upon discovery of the packages he questioned the appellant in English on the purpose of his trip here and how long he planned to stay here, and the appellant's reaction was '... gelabah dan kelihatan takut ...'. After his arrest by PW7, the appellant was handed over to the investigating officer, Sazali bin Unus ('PW9').

[4] Based on the salient facts above, the learned High Court judge found that the three elements to prove the charge of trafficking, viz, that the drug found is a dangerous drug and listed in the First Schedule of the DDA (which is an uncontroverted fact), that the appellant had custody and control of the drug and that he was trafficking in the same had been proven by the prosecution. For the second and last elements, His Lordship raised the presumption of knowledge under s 37(d) of the DDA as well as used the definition of trafficking in s 2 of the said Act to complete his finding that a prima facie case has been successfully proven by the prosecution against the appellant and for which he was called to give his defence to the charge.

[5] At the hearing of the appeal before us, the finding of a prima facie case against the appellant was called into question because according to learned

counsel for the appellant, the learned High Court judge had misdirected himself on the evidence when His Lordship said at para 9 of His Lordship's judgment at p 16 of Vol 1 of the appeal record as follows:

> 9. Satu fakta yang tidak dipertikaikan oleh pihak pembelaan ialah, sebelum beg P6 dan P7 diimbas oleh SP4 dan SP7, OKT telah dilihat menolak troli di mana beg P6 dan P7 berada di atasnya *secara bersendirian*. OKT juga telah mengimbas kedua-dua buah beg yang dia bawa setelah diminta oleh SP7 walaupun pada mulanya OKT dikatakan engan berbuat demikian. (Emphasis added.)

[6] This is because, said learned counsel, both PW4 and PW7 had been challenged in cross-examination that the appellant was not alone at that point in time but with another. PW7 was also challenged that he did not prepare the search list (exh P24 at pp 88–91 of Vol 3B of the appeal record) because he never signed on it. A perusal of the said list shows that it was signed by another customs officer, Kamarudin bin Abu ('PW6'), the investigating officer (PW9) and the appellant. Beneath both these two officers' signatures were the date and time, that is 13 January 2014 at 6am. However in re-examination, PW7 explained that although he was the actual person who did the seizure and handed over the exhibits to the investigating officer after marking them as well as lodging the police report on the incident (exh P54 at p 99 of Vol 3B of the appeal record), he had requested PW6 to document the seizure that was the sole duty assigned to PW6 that morning and he was present when the handing over was done to the investigating officer. PW6 in his witness statement (exh P23 at p 86 of the appeal record Vol 3B) and in his oral evidence (at p 39 Vol 2A of the appeal record) confirmed the said task was assigned to him as well as the presence of PW7 at the handing over of the exhibit. We noted from the cross-examination of PW6 that it was never put to him that PW7 was not present during the handing over so although PW7 did not sign on the said exhibit, he was there physically to witness the whole event.

[7] As for not being alone when seen pushing the trolley, as highlighted by the learned deputy public prosecutor before us, PW7 being the relevant witness who should be questioned on this was never challenged with the said fact during cross-examination but only PW4 was (see lines 13–14 of p 18 of Vol 2A of the appeal record). PW4's answer was he was not sure and which answer is logical considering that he was manning the scanner at that time.

[8] The last issue raised by learned counsel on the finding of prima facie case is that the learned High Court judge had failed to make a finding of custody, control and knowledge against the appellant which was clearly and with respect, a baseless argument because His Lordship did so. This can be seen at paras 8–18 of his judgment which we would not reproduce here save to say that the learned High Court judge had analysed the evidence pertaining to the discovery from the evidence of PW4 and PW7, the opening of the bags from

A the keys obtained from the accused's wallet and even considered the defence of the appellant which was raised by the appellant in the cross-examination of the said witnesses, that is, the existence of another person with him said to be the owner of the impugned bags. This we would elaborate subsequently when we deal with the issue of his defence.

B

THE DEFENCE

[9] The essence of the appellant's sworn testimony was that he came to Malaysia to look for goods to sell back in Tamil Naidu although he later changed that to say that he came here to get a visa and work permit. Whilst queuing at Chennai Airport with just his sling bag, he met a friend named Jaghir who was with one Pitchai Ghani Mohammad Shariff the owner of the impugned bags who was travelling in the same flight with him. He said he agreed to Jaghir's request to help Pitchai carry the bags (which was checked in under his name) as the latter had helped him before that is, '... membawa pekerja-pekerja untuk membuat permit dan visa'. and he was told that the bags contained special rice powder not available in Malaysia. This he did because he trusted Jaghir who was a Muslim and living not far from his village. Though Jaghir offered him RP10,000 to carry the bags he declined because he said Jaghir was his friend. Upon arrival at the airport, the appellant said Pitchai put the bags on the trolley whilst he pushed it but after putting the bags in the scanner and when he wanted to retrieve them, Pitchai was no longer behind him. The keys to the two bags according to the appellant were found in the side pocket of the bag and not in his wallet as claimed by PW7.

C

D

E

F

[10] An immigration officer, Muhammad Faizal bin Saidin (DW2) was called to give evidence that there was indeed a record of a passenger named Pitchai entering the country on the same date and flight as the appellant. This is shown in exh D84 (at pp 141–142 of the appeal record Vol 3B) which is the record of movement of passengers in and out of Malaysia kept by the Immigration Department.

G

[11] The learned High Court judge rejected the defence of the appellant as being an afterthought because it contradicted that of his caution statement (exh D83 at pp 138–140 of the appeal record Vol 3B) which was recorded two days after his arrest. In that caution statement the appellant admitted he had come to Malaysia ten times at least and that his then current business was to look for workers to work in restaurants in Malaysia for which he was paid commissions. At the airport, he said he met Jaghir who requested him to check in a bag belonging to his relative and Jaghir pointed out a couple (a man and a woman) from afar as the owner of the bag. He said he opened the bag and found the packages which Jaghir said were rice powder. Jaghir promised to pay him RP10,000 for his assistance in carrying the bag. At the airport he said after

H

I

he placed the bag and his own bag on the trolley, another co-passenger from his flight, a young Indian man placed the other sling bag (the one containing the drug) onto his trolley, that is, 'tumpang' his trolley. He said if he were not arrested, Jaghir would have called him to tell him to whom he should deliver the bag to.

[12] Based on the above narration of his testimony and his caution statement, one could not fault the learned High Court judge for labelling the defence as an afterthought. Pitchai was never at all mentioned in that caution statement and what is worst, the sling bag containing the drug was said to be placed on the trolley by a co-passenger. The evidence in both were almost totally at variance with each other and His Lordship's rejection of the same was completely justified even though His Lordship said that Pitchai did board the same flight as the appellant. To this latter statement we also have no cause to disagree because it can be seen from the passengers flight manifest (exh P80) at p 132 of the appeal record, Vol 3B, that it was so. The learned High Court judge also found the appellant to be wilfully blind because the packages could be more thoroughly examined by the appellant when he opened it and His Lordship could not believe that the appellant had gone overboard to help Pitchai.

[13] Other than the above reasonings by the learned High Court judge, another incriminating evidence against the appellant was his reaction when questioned by PW7 as mentioned earlier (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717) and as we had just said, the obvious contradictions in the defence as testified by him and in his caution statement which impacts negatively on his credibility as a witness and that of his defence. We also could not rule out the probability, given that Pitchai's name was never mentioned in the caution statement and that it was only brought up at the trial where the flight manifest was tendered as evidence by the prosecution, that Pitchai's name was simply plucked from that flight manifest by the defence to justify the ownership of the impugned drugs.

[14] Lastly, we need to mention another issue raised by the appellant which was the absence of CCTV recording and fingerprint evidence on the packages of drugs which had prejudiced the appellant. This same issue was raised before the learned High Court judge and His Lordship ruled as follows in para 45 of his judgment:

> 45. Mengenai isu CCTV, cap jari dan pemeriksaan panggilan telefon OKT, saya berpendapat, perkara-perkara ini tidak perlu untuk diberikan penekanan yang terlalu serius. Jika tidak pengedar-pengedar dadah boleh terlepas dengan mudah. Saya merujuk kepada kes *Zulfikar bin Mustaffah vs PP* [2001] 1 SLR 633 dan *Mazlani bin Mansor v PP and Other Appeals* [2014] 2 MLJ 18, di para (29) dan (30), Mahkamah Rayuan memutuskan berikut:

A [29] As regards the appellants denial of knowledge of what was in the plastic bags and the sacks, as the contents were not visible to the naked eye, we find this factor should not be given too much weight. As was said by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633 at p 639 (which was referred to with approval by our Federal Court in *Public Prosecutor v*
B *Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337) such assertions should not be given too much weight 'otherwise drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings'. In our view the circumstances just mentioned by us show that the appellants' claimed ignorance of the drugs in the
C plastic bags and sacks is not credible.

[30] *With regard to the absence of the appellants' fingerprints on the incriminating items, we find that not much weight can be attached to such evidence either because in criminal law, a person may still be in possession of a movable thing without actually being in physical contact with it. What is required is that he is so situated*
D *with respect to it that he has the power to deal with it as owner to the exclusion of all other persons which, as we found earlier, is the case here.* (Emphasis added.)

[15] We are in total agreement with what was stated by this court as
E highlighted above to answer the issue raised on the fingerprint and would adopt the same here. As for the CCTV recording, the evidence of PW9 on this is that he had applied for a copy of the recording for the said date and time vide a letter marked as exh P81 which was acknowledged by a Senior Officer of AVSEC of Malaysia Airports (Sepang) Sdn Bhd but received no response despite making
F follow-up queries with the said authority. In any event, as rightly submitted by the learned deputy public prosecutor, the aforesaid recording and fingerprints are merely corroborative evidence and did not in any way, given the overwhelming evidence stacked against the appellant, in particular his possession of the keys to open the bags as well as the extremely weak defence,
G raised any reasonable doubt on the prosecution case and/or rebut the presumption of knowledge raised by the learned High Court judge.

[16] The Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311 held that:

H We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v PP* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the
I defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a judge does not accept or believed the accused explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case. To satisfy this test it is not so much the words used by the judge, but rather the actual application of the test to the facts of the case that matters.

[17] We must say that the learned High Court judge had indeed applied the test as stated above and had correctly arrived at the finding that the appellant was guilty of the offence as charged. Our case law is replete with cases of drug couriers who were similarly convicted when found to carry drugs in their luggage at the airports throughout our country and the appellant is not an exception for the defence he raised, as per the authority cited above is not only unbelievable but did not raise a single reasonable doubt on the prosecution's case.

[18] Thus, for the reasons stated above, the appeal was dismissed and the decision of the learned High Court judge was affirmed.

Appeal unanimously dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar